1980

Richard B, Jensen as State Auditor of the State of Utah v. William K, Dinehart, as the Director of the Division of State Lands of the State of Utah : Brief of Appellant

Utah Supreme Court

RICHARD L. DEWSHUP, DENISE A. DRAGOO; ATTORNEYS FOR APPELLANT;MICHAEL M. DEAMER; ATTORNEY FOR RESPONDENT

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD B. JENSEN, as State Auditor of the State of Utah,

Plaintiff and Appellant,

v.

WILLIAM K. DINEHART, as the Director of the Division of State Lands of the State of Utah,

Defendant and Respondent.

Case No. 16832

BRIEF OF APPELLANT

APPEAL FROM THE ORDER OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE CHRISTINE M. DURHAM, JUDGE.

RICHARD L. DEWSNUP
Assistant Attorney General
DENISE A. DRAGOO
Special Assistant Attorney Gener

ATTORNEYS FOR APPELLANT
301 Empire Building
231 East Fourth South
Salt Lake City, UT 84111

MICHAEL M. DEAMER
Deputy Attorney General

ATTORNEY FOR RESPONDENT
236 State Capitol
Salt Lake City, UT 84114

February 29, 1980

TABLE OF CONTENTS

particular mineral must be extracted and sold before the production royalty is paid. But, as will be seen in the next section of this Brief, there are no legal or practical reasons to support placing production royalties in permanent funds.

D. Potential Practical and Legal Nightmare

To require mineral production royalties to be deposited in permanent funds would be to open a most ominous Pandora's Box. And there is no legal necessity for doing so.

First, as has been shown, the Enabling Act contemplated only (1) that designated lands without known mineral value be transferred to the State, (2) that such lands be sold and the proceeds of sale deposited in permanent funds, and (3) that only the income derived from the permanent funds be used to support the public schools. It is nothing short of sheer fantasy to assume that Congress had some scheme in mind in 1894 for Utah's use of mineral proceeds from minerals which Congress did not intend to grant to the State.

The first word Congress gave to Utah concerning minerals was in 1927, and that grant, with accompanying conditions and restrictions, was entirely clear—and Utah has at all times strictly complied with those conditions and restrictions. And there is no requirement that any mineral proceeds be deposited in any permanent fund. See Section II of this Brief, supra.

However, it is possible that Utah received title to some minerals by virtue of the Enabling Act and without the aid of

DATED this 29th day of February, 1980.

RICHARD L. DEWSNUP
Assistant Attorney General

DENISE A. DRAGOO
Special Assistant Attorney General

301 Empire Building
231 East Fourth South
Salt Lake City, UT 84111

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Appellant were delivered to Michael L. Deamer, Deputy Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, Attorney for Respondent, this 29th day of February, 1980.

DENISE A. DRAGOO

APPENDIX B

IDENTIFICATION OF FUNDS AND ACCOUNTS IN CONTROVERSY

OPERATING FUNDS INTO WHICH MINERAL PROCEEDS SHOULD HAVE BEEN DEPOSITED	AMOUNTS WHICH SHOULD HAVE BEEN DEPOSITED TO OPERATING FUNDS
Uniform School Fund for public schools	$ 14,814,150
Utah State Hospital operating fund	297,627
University of Utah operating fund	218,142
Normal School operating fund	180,575
Miners Hospital operating fund	173,946
State Industrial School operating fund	128,729
School of Mines operating fund	127,839
Utah State University operating fund	114,948
School for the Deaf operating fund	98,879
Reservoirs	98,726
School for the Blind operating fund	82,748
Public Buildings	44,702
	$ 16,381,011

Compare this with Utah's actual expenditures (State and counties) for the support of the common public schools for 1979: $402,423,826.00. And that figure includes only maintenance and operation—not capital expenditures. Thus, the Federal grant for the support of Utah's public schools, intended to be equal to one-ninth of the total value of the State, now yields slightly more than two percent of the cost of supporting the public schools—and, as indicated, this does not include expenditures for land, buildings and other improvements. Unfortunately, the Federal school land grant to Utah for the support of the common schools never materialized as intended. So far, the economic benefits to Utah from the solemn public trust have been insignificant.

How can this be? The discussion which follows will show some of the ways in which the Federal Government has failed to keep its commitments to Utah and has unfairly and illegally diminished the original school land grant.

D. *Federal Violations of the Bilateral Compact*

1. *The 5% Violation*

This Court judicially knows that the firm policy of the United States in 1894 (date of Utah's Enabling Act) and 1896 (date of Utah's statehood) was to dispose of the unreserved public domain. Indeed, Section 9 of Utah's Enabling Act (28 Stat. 107) provided that the United States would dispose of the unreserved Federal lands and would pay to Utah, as an additional component of the school land grant, 5% of all proceeds

The original Art. X of the Utah Constitution of 1896, Sections 5 and 10, provided:

> "Section 5. The proceeds of the sale of lands reserved by an Act of Congress, approved February 21st, 1855, for the establishment of the University of Utah, and of all the lands granted by an Act of Congress approved July 16th 1874, shall constitute permanent funds, to be safely invested and held by the State; and the income thereof shall be used exclusively for the support and maintenance of the different institutions and colleges, respectively, in accordance with the requirements and conditions of said Acts of Congress." (Emphasis added.)
>
> * * *
>
> "Section 10. Institutions for the Deaf and Dumb, and for the Blind, are hereby established... . All the proceeds of the lands granted by the United States, for the support of a Deaf and Dumb Asylum, and for an Institution for the Blind, shall be a perpetual fund for the maintenance of said institutions. It shall be a trust fund, the principal of which shall remain inviolate, guaranteed by the State against loss or diversion." (Emphasis added.)

Originally, the Utah Constitution in Art. X, Section 3 of the Constitution, referred to the "perpetual" or "permanent" school fund as only the "State school fund" and did follow the express mandates regarding the nondisposition of the funds set forth in the Enabling Act of 1894.

On or about 1937, the Utah Legislature amended its Constitution, which amendment became effective January 1, 1939, and provided, in part:

> "... And the proceeds of the sale or other disposition of minerals or other property from school and State lands, other than those granted for specific purposes ... shall constitute a fund to be known as the uniform school fund, which uniform school fund shall be maintained and

v. Sweet, 245 U.S. 563, 38 S.Ct. 193, 62 L.Ed. 473 (1918), wherein the United States Supreme Court held that lands known to be valuable for coal mineral at the date title would vest, were not intended by Congress to be included in the grant of school section lands in Utah's Enabling Act. The words "lands known to be valuable for mineral" are words of art and have a specific meaning, namely, (1) location (2) filing claim (3) annual assessment work and that if a claim is staked out and assessment work is done, then the land is known to be valuable for mineral. There is no question that title to the school section lands passed to the State and there is no dispute that those minerals which were not "known to be valuable for mineral," as those terms are used in the mining laws, passed to the State of Utah at statehood (or at the official survey date a few years thereafter). In fact, Utah has "presumptive title" to mineral royalties under the Enabling Act if not known to be mineral at the time of the official government survey (said survey being circa 1902). See generally Work v. Braffet, 276 U.S. 560, 48 S.Ct. 363, 72 L.Ed. 700 (1928). See, also, Deffeback v. Hawke, 115 U.S. 392, 6 S.Ct. 95, 29 L.Ed. 423 (1888).

Following the decision of the U. S. Supreme Court in Sweet, supra, it appeared as if a great injustice was placed upon the citizens of the State of Utah who in good faith made purchases of State school section lands. The State would transfer its title in good faith. In later years, subsequent development of the surrounding territory would

> derived from the sale, lease, or rental of these school lands, should be invested to form a principal, permanent fund--the interest only of which might be used for the benefit of the common and public schools or other state institutions as the case may be. Thus, it will seem that the principal can never be depleted or dissipated. It will be noted that, under this plan, it is necessary for a state to accumulate a principal fund of some considerable amount in order to realize sufficient interest to be of benefit to its common school system and to result in the reduction of taxation for school purposes. Having this in mind, your committee fully realizes the difficulties under which these states are forced to labor and, therefore, reach the conclusion that their cause was a meritorious one, and that Congress could well afford to adopt a beneficent attitude toward them in view of the end desire to be accomplished. It also prevents valuable mineral lands from falling into the hands of third parties, thereby insuring the proper return and full measure of support to the particular institution to which the lands were granted.
>
> "Some states have already enacted laws reserving under themselves all minerals found in state lands which are sold. Those that do not have such provisions upon their statute books, of course, must comply with the terms of the act in order to realize its benefits." (At pages 3 and 4)

The above-cited House Committee report, even though suggesting an amendment to the statute not relevant herein, demonstrates that the United States Congress, in adopting the Act of 1927, clearly intended that the mineral proceeds from State school section lands would be treated in exactly the same manner as set forth originally in the respective Enabling Acts of the various public land States affected thereby. In fact, the Act itself, in Chapter 57, subparagraph (b) provides, inter alia:

in usage within the same Enabling Act would compel one to believe that Congress intended a different meaning to attach to Section 10 in discussing "proceeds of lands."

Section 8 of the Enabling Act also provides inter alia:

> "That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds." (Emphasis added.)

which reenforces the conclusion that proceeds include all mineral derivative revenue.

Utah Code Ann., Section 68-3-1, provides:

> "Words and phrases are to be construed according to the context and approved usage of the language... ."

"Where there is doubt respecting true meaning of certain words, then words should be read in light of conditions and necessities which they are intended to meet and objects sought to be attained thereby." United States Smelting Refining & Milling Co. v. Utah Power & Light Co., 58 Utah 168, 197 P. 902.

Appellant (Appellant's Brief, pages 18-19) argues the diminution of land value is required and a sorted analogy is offered (page 18) that rentals from school lands are similar to interest earned from the permanent fund. The analogy fails when considered further. Do the rentals remain in the fund to generate compounded interest? No. Is the benefit to school children thereby compounded if the rentals are spent annually? No. There is no permanent benefit to school children. The permanent school fund

Clause of the United States Constitution. The Court stated:

> "Herein, there are involved conditions affixed by Congress in the Enabling Act which pertain to proprietary rights of the United States and the placing of restrictions upon the disposition of the property of the United States being placed in trust with the State as distinct from conditions qualifying political rights of the new State. We do not perceive a limitation or restriction on the State in the exercise of its sovereign powers in the advancement of education or schools in the terms of an Enabling Act. We see therein only regulations touching the care and disposition of properties granted in trust to the State by the federal government.
>
> "It has been held by the highest authority that congressional regulations in an Enabling Act remain in force after admission of the State into the union, if the subject is one within the regulating power of Congress. United States v. Sandoval, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107." (At page 659)

The Court found that said regulations by the United States Congress in the Enabling Act exist as valid laws of the United States, and under the Supremacy Clause of the United States Constitution, Art. VI, Section 2, said laws may not be modified or changed by an act of the Oklahoma Legislature or the people of Oklahoma in amending their Constitution.

The Court in the above Oklahoma v. Commissioners, supra, distinguished the case of Coyle v. Smith, 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853, (1911), which struck down a provision of the Oklahoma Enabling Act, requiring the City of Guthrie to be maintained as the capital city of the new State of Oklahoma until 1913, as an invasion by Congress into the

elected to interpret Colorado's constitution in such a way as to find the ordinance unconstitutional under the state constitution. The entire substance of appellant's case here rests on its supplication that this honorable court abandon the clear weight of legal authority throughout the United States and base its decision on one lone jurisdiction. This court has never held itself bound by the decisions of the Colorado Supreme Court; it was, however, shown such deference to decisions of the United States Supreme Court interpreting constitutional provisions similar to Utah's constitution.

POINT II. THE SUBJECT ORDINANCE DOES NOT VIOLATE THE CONSTITUTION OF THE STATE OF UTAH.

A. SIMILAR PROVISIONS IN THE FEDERAL CONSTITUTION AND THE CONSTITUTION OF THE STATE OF UTAH SHOULD BE SIMILARLY INTERPRETED.

Appellants claim that the county ordinance, in addition to violating the federal constitution, violates the Constitution of the State of Utah. Appellants allege in their complaint that the ordinance in question violates Article VI (Legislative Department) and Article I, Section 7 (due process) of the Constitution of the State of Utah (see paragraphs 5, 6 and 7 of the Complaint at page 3 of the record). Without amending their complaint the appellants now raise, in this appeal, the argument that the ordinance also violates the Article IV, Section I, and Article I, Sections 2, 18 and 24 of the state constitution.

The due process clause of the Federal Constitution (5th and 14th Amendments) and the due process clause of our state consti-

of evidence to the contrary, it can be assumed that the demand for massages will remain relatively constant after the ordinance becomes effective. The entrepreneur operating a massage parlor will adapt to this governmental regulation and hire masseurs and masseuses in a ratio corresponding to his clientele. Massage parlors that have been relying on the sale of sexual favors will suffer financial losses and their business will be suppressed, but the commerce of selling massages will continue with regulation and without suppression or prohibition.

The restrictions imposed by the ordinance are regulatory in nature and not prohibitory. See WORDS AND PHRASES, "Regulate", Vol. 36A, page 315. The court in Patterson v. City of Dallas, rejected the plaintiff's allegation that the opposite sex massage ordinance went beyond regulation and stated:

> It does not prohibit, but permits, a masseur to administer a massage to a member of the male sex, and a masseuse to administer a massage to a member of the female sex. The right to conduct a massage establishment, after complying with the Massage Ordinances and securing a permit, is not prohibited but is merely regulated. [At page 841]

The court in Ex parte Maki, adopted the same view:

> Since the ordinance in question does not prohibit either man or woman from engaging in the occupation of the masseur but merely regulates the conduct of a business in the interest of the state, there is no infraction of article XX of the Constitution. [At page 67]

In summary, the ordinance before the court will regulate massage parlors and will suppress the sale of sex acts in massage parlors.

The leading case in the State of Utah in the area of pre-emption is Salt Lake City v. Kusse, 93 P.2d 671 (1938), wherein Justice Wolfe set down the rule that a local municipal ordinance is not in conflict with a similar state criminal statute unless (1) the local ordinance permits activities prohibited by the state law, or (2) the local ordinance is inconsistent with the state law. The court stated at page 673:

> The city does not attempt to authorize by this ordinance what the Legislature has forbidden; nor does it forbid what the Legislature has expressly licensed, authorized, or required.
>
> * * *
>
> Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of the mere lack of uniformity and detail.

Thirty years later, the Supreme Court of Utah, in the case of Salt Lake City v. Allred, 437 P.2d 434 (1968), had before it an argument similar to the one that is now urged upon the court by the appellants and set forth in Lancaster. Salt Lake City had adopted an ordinance prohibiting aiding or abetting the directing of any person to any place for purposes of committing and act of sexual intercourse for hire and the court upheld the ordinance and stated at page 437:

> In summary we conclude that the state has not preempted the field of sexual offenses since the ordinance in question is a proper exercise of police power, and the ordinance is not inconsistent with the state statutes pertaining to sexual offenses.

Thus, the rule in Utah is directly contrary to the rule in California set forth in Lancaster. As to whether or not the

Annotated, Section 17-5-77, 1953 as amended, supra, under which Salt Lake County enacted the subject ordinance.

The court in Allred further stated that the language contained in the enabling statute was sufficient to sustain the ordinance directed at prostitution and stated at page 435:

> Also in accordance with the power contained in Section 10-8-84, U.C.A. 1953, the Utah Supreme Court, in Ogden City v. Leo, 54 Utah 556, 182 P. 530, 5 A.L.R. 960, upheld as reasonable and valid a city ordinance prohibiting the maintenance of booths of certain dimensions in restaurants so as to prevent persons of both sexes having no regard for law or morals meeting in such places. If the prohibition involved in the Leo case had a reasonable relationship to the preservation of the public morals, the prohibition of an act of sexual intercourse for hire under the city ordinance in this case would also appear to bear a reasonable relationship to the preservation and protection of public morals.
>
> The protection of public morals has always been a matter of local concern which requires regulation by municipalities, and properly falls within the scope of the police power.

The supreme court in State v. Salt Lake City, 21 U.2d 318, 445 P.2d 691 (1968), had before it a comprehensive ordinance that purported to license nonprofit clubs. The plaintiffs sued Salt Lake City alleging that the area of licensing private clubs was preempted by the State. The court determined that the area was preempted by the State and the City's ordinance was struck down, but in doing so, the court made an important distinction between municipal ordinances that impose additional requirements above and beyond those required by the State legislature and those municipal ordinances that prohibit citizens from doing some act, such as is the case with the ordinance in question. The court stated at page 694:

determined that the health, safety, and welfare of the community required a regulation requiring massage parlor licensees and masseurs to be at least 21 years of age. Section 15-18-3(1) of the ordinance requires all licensees to be at least 21 years of age.

This court ruled that age was not a constitutionally suspect classification in Purdie v. University of Utah, supra, and that classifications based on age need only be rational related to a legitimate state interest. This court held at page 833:

> Plaintiff has also urged us to declare that age is an inherently suspect classification and that post-graduate education at a university is a fundamental right, requiring application of the strict scrutiny test. We decline to do so, as the authorities cited are unpersuasive, but base our reasons and opinion on the rational relationship test, noted ante.

At the public hearing, Captain Morgan testified that massage parlors are often fronts for the sale of illicit sexual activities and that it was common to see teenage girls who worked in the massage parlors arrested for such crimes (record, pp. 35C and 35D). It is apparent that the purpose of the ordinance, including this section, was to suppress the incidence of illicit and immoral sexual activities in massage parlors in the unincorporated area of Salt Lake County. Such a purpose constitutes a legitimate state interest for the purpose of equal protection analysis. By reasoning that young massagists would be susceptible to sexual exploitation because of their lack of maturity, and that there is some relationship between age and the maturity, the Board acted in a reasonable manner to further a legitimate state purpose.